

## **Decision ERC/2016/249 (OCT-TV)**

### **Criteria for evaluation of non-compliance with the provisions of nos. 3 and 4 of article 27 of the Television and Audiovisual Media Services Law**

Lisbon, 22 November 2016

#### **Regulatory Board of the Regulatory Authority for the Media (ERC)**

#### **ERC/2016/249 (OCT-TV) Decision**

**Subject:** Criteria for evaluation of non-compliance with the provisions of 3 and 4 of article 27 of the Television and Audiovisual Media Services Law

Pursuant to no. 9 of article 27 of the Television and Audiovisual Media Services Law, the Regulatory Board has issued a decision on the **Criteria for evaluation of non-compliance with the provisions of 3 and 4 of article 27 of the Television and Audiovisual Media Services Law**, which is accompanied by a document that systematises ERC's understanding on various issues related to these regulations, reflected in the various decisions approved since the creation of this regulatory authority.

Lisbon, 22 November 2016

The Regulatory Board,

Carlos Magno

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**Criteria for evaluation of non-compliance with the provisions of 3 and 4 of article 27 of the Television Law, which aim to protect more sensitive audiences, in particular children and adolescents.**

It should be stressed first and foremost that this document is systematically organised on the basis of the legal logic of absolute and relative prohibitions, as enshrined in nos. 3 and 4 of Article 27 of the Television Law.

Content subject to an absolute prohibition contains two levels of prohibition, namely: (i) complete prohibition for programmes which may manifestly, seriously and gravely undermine the free formation/development of the personality of children and adolescents, such as content containing gratuitous portrayal of violence, which cannot be broadcast; (ii) pornographic content cannot be broadcast on non-conditional services, but may be broadcast on conditional access services. The content listed in no. 4 (relative prohibition), which obviously excludes the aforementioned categories, should be evaluated according to the criteria detailed herein, wherein such evaluation must consider the context in which they are inserted and the time when they are broadcast.

The importance of contextual evaluation stems from the need to consider the composition of the potential audience, the specific material of the programme, among other factors that may influence the viewer's perception of the programme's content, wherein one of the factors to be taken into account is the time slot when a significant number of children and / or adolescents may be watching, in particular:

- The hours between 6 a.m. and 10:30 p.m., which extend beyond school hours, specifically in the morning, prior to the start of the school day, and at the end of the afternoon, after school;
- School holidays, public holidays and weekends.

The regulatory authority for this sector aims to provide more detailed information on of these criteria in order to ensure protection of children and adolescents.

It is above all important to consolidate the concepts of "child" and "adolescent", in order, as far as possible, to minimise any divergent interpretations regarding the applicability of the proposed new criteria. Greater information is provided on these concepts in light of the contributions provided by the National Mental Health Plan (PNSM) issued by the General Directorate of Health (DGS), in compliance with the protocol [1] signed between the DGS and the ERC, aimed at "developing cooperative actions that promote greater awareness of the importance of the activity of the media in promoting mental health and preventing illnesses".

According to the aforementioned Plan, and pursuant to article 1 of the Universal Declaration of the Rights of the Child, adopted by the General Assembly of the United Nations on 20/11/1989 and ratified by Portugal on 21/09/1990, children are

understood, to be "( ...) as any human being under the age of eighteen, unless the age of majority is attained earlier under national legislation" (by national law).

In turn, adolescents<sup>1</sup> are understood to mean any human being who is undergoing the stage of biopsychosocial development, which authors on this topic consider starts between the ages of 11 and 13, and which follows the period of childhood and predates adulthood (that formally commences at the age of 18 ), corresponding to a period of definition of secondary sexual characteristics, followed by progressive maturation of the individual's genital and reproductive capacity, accompanied by psychological changes, primarily emotional, that are highly relevant for structuring of mental life during adulthood, including the personality.

The definition of a child used by the World Health Organization stems from the fact that when human beings are born they are dependent on others to survive, thereby initiating a very slow process of physical and mental maturation (formally up to the age of 18), wherein the emotional quality and affective nature of interaction with the family and social environment plays a decisive role on attaining maturity, expressed through recognition of the special vulnerability associated to this formative period.

In the Portuguese legislative framework, this reality is reflected, among other examples, via the following:

- the Civil Code recognizes that persons under the age of 18 as well as persons of majority age who have a proven cognitive potential lower than 18 years cannot be held legally responsible for their actions <sup>2</sup>;
- eligibility to vote, date of military recruitment, right to hold a driver's license and, pursuant to DL no. 106/2015 of 16 June, the prohibition on supplying ... selling or, for commercial purposes, providing alcoholic beverages in public places and in places open to the public: a) to minors (...)» (article.º 3º, no. 1).

In relation to the Television Law, Portuguese legislation only considers the potential negative consequences from viewing certain content on formation of the personality of children and adolescents, when the personality is effectively the image that each person has of himself and portrays to others, in particular in a relational context, but, as has been assumed for many years, this structure is highly influenced by the emotional / affective, educational and cultural environment in which the person has grown up and lives. In other words the personality may be a "visiting card", a "social image", that hides eventual emotional and psychic instability resulting from the process of growth and building psychological maturity (including emotional and

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<sup>1</sup> This concept derives from the area of pediatrics and developmental psychology, and it is better to call it "adolescence", which is preceded or initiated (according to the authors) by pre-puberty and puberty, that coincide, respectively, with the appearance of secondary sexual characters and the physiological maturation of the genitals – menstruation for girls and ejaculation for boys. However, especially because of the prolongation of the status as a student, which often involves economic dependence on the parents, there is a psychosocial delay at a psychological level, because autonomisation as an adult usually only occurs after the age of 16, or considerably older.

<sup>2</sup> This referential, called the "social clock", will have to be crossed, legally upon attaining judicial majority age, at the age of 16.

affective dimensions) which has not occurred with a “suitable” educational and social environment, above all family environment, in particular in the event of significant situations of violence (especially physical and / or emotional), lack of decency, lack of respect for more vulnerable persons, whether in person or via the television.

**i. Non-compliance with the provisions of no. 3 of article 27 of the Television Law**

No. 3 of article 27 of the Television Law stipulates that television broadcasting of programmes that may manifestly, seriously and gravely impair the free formation of the personality of children and adolescents, such as pornography, in non-conditional programme services, or gratuitous portrayal of violence.

**Pornography**

For the purposes of the provisions of this article, pornographic content is considered to be content which presents:

- successive, genuine or apparently realistic sexually explicit acts, that are prolonged or repeated over the course of the programme (explicit sexual acts are defined to mean visualization of the sexual act, with explicit presence of the genitalia, e.g. penetration, masturbation, etc.); or
- sexual violence, or sexual behaviour such as paedophilia, bestiality, sado-masochism and sex-related humiliation and other paraphilias, which are demeaning to the dignity of human beings and are made to appear to be natural or glamorous; or
- representation of sexual acts involving children; or
- explicit and degrading sexual language used by at least one sexual partner and / or directed to another, in an attempt to degrade the image of one of the partners, in violation of their dignity as a human being, depersonalising them and considering them solely as an object to be used for personal sexual pleasure; or
- absence of intellectual, aesthetic or creative purpose in the programme that presents sexual acts; and
- the goal of sexually arousing the public.

**Gratuitous portrayal of violence**

Gratuitous portrayal of violence means "the dissemination of messages, words and images, the violent content or presentation of which is given a prominence which is

not justified in the context»<sup>3</sup>, including torture and inhumane, sadistic, cruel or degrading treatment. In fact, respect for human dignity is a fundamental criterion for assessing the degree of violence of television content: persons who assume an outlook that opposes human dignity must be kept away from television programming. Decontextualised, sadistic, and humiliating violence makes violence a banal phenomenon and should not be broadcast via television. As a result, any violence in television content should be displayed in order to illustrate the story and only to the extent that is strictly necessary. In the event of gratuitous portrayal of violence, the opposite takes place: the story is created only to provide a framework for exhibiting violence.

## Other

It should be emphasized that it is not only the pornography or gratuitous portrayal of violence that falls within the protective scope of this norm. In fact, content that seriously offends the dignity of human beings<sup>4</sup>, to the extent that one or more actors are deprived of their dignity, i.e., they are instrumentalised to the point of becoming "things" instead of "people", is also covered by the terms of no. 3 of article 27 of the Television Law.

### ii. Non-compliance with the provisions of no. 4 of article 27 of the Television Law

No. 4 of article 27 of the Television Law stipulates that television broadcasting of any other programmes that are likely to have a negative impact on the development of the personality of children and adolescents must be accompanied by **permanent dissemination of an appropriate visual identity, and may only take place between 10:30 p.m. and 6 a.m.** Analysis of the decisions made by the ERC on this legal provision enables us to identify a set of recurrent themes in television programming that are qualified as having a negative impact on the development of the personality of minors, which have been described above (see point III) without prejudice to other themes, that may arise, which will be analysed below.

However, prior to such analysis, it is necessary to underline the importance of the context of the programme in question, since this plays a key role in determining whether any specific content is likely to undermine the free development of the personality of children and adolescents.

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<sup>3</sup> R(97)19 Recommendation of the Committee of Ministers of the European Council, of 30 October ("Portrayal of violence in the electronic media")

<sup>4</sup> "Dignidade de cada pessoa como ser livre e responsável, único e irrepetível" (Vieira de Andrade, José Carlos, "Os Direitos Fundamentais na Constituição Portuguesa de 1976", 3rd edition, 2007, Almedina, p. 110).

## **1. Importance of the context**

The negative influence on the free development of the personality of children and adolescents should be weighed against not only the programme material itself, but also the context in which the programme is watched. In other words, programme services should take into account the profile of their audience, by weighing the contextual factors that may influence the viewer's perception of the programme's content and thus the degree of negative influence it may have on the minor.

The context refers, in particular, to the type of programme service, kind of programme, film or series, the editorial content of the programme (as a whole) and the editorial justification for inclusion of material that is likely to have a negative influence on the formation of the personality of children and adolescents.

For example, if the objective of the programme is pedagogical, especially in educational programmes, issues such as sexuality, violence, drug addiction and imitable behaviour may be included and may even be the main theme of the programme, since the programme is intended to teach minors to deal properly with these issues, especially during puberty and adolescence. If the programme is an informational programme, these themes will be permitted, but with caution and strictly to the extent that is necessary to fulfil the informational goals. In the case of a fiction programme, it will be necessary to consider whether it is necessary to display potentially harmful material to illustrate the story, and the specific goal of the story in question: pedagogical, denunciation, awareness-raising.

It will also be relevant to know whether the content is historical or contemporary, to the extent that it may be easier for minors to distance themselves from a work set in the past than one set in the present day. Another important aspect that should be considered, is to determine whether a programme is clearly fantasy-based or realistic, or aspires to be realistic, since, once again, minors will, in principle, find it easier to distance themselves from content that pertains to the domain of fantasy (fairy tales, fables, myths, legends, cartoons). In turn, humorous content also facilitates such detachment.

Another factor is the dominant tone of the programme's language: use of aggressive, direct, obscene language, with recourse to slang, when addressing a certain subject makes it more likely to undermine the free development of the personality of children and adolescents than when the same topic is portrayed with gentler, and more polite and educated language.

The programme's merit is also relevant (whether it is recognised for its artistic, historical, documentary, informational merit, etc.), and the character and impact of the programme. A programme with a darker or heavier environment is more likely to impair the free development of the personality of children and adolescents. Likewise, a programme that conveys a more pessimistic or even hopeless view of the world, or that considers or portrays transgressive behaviour as being normal also has greater

potential to undermine the development of younger audiences. The content's impact means the feelings and emotions that this content engenders in the audience. For example, certain horror films are considered to be harmful to minors under the age of 16 because they will perturb the audience, rather than due to their violent content.

The editorial justification for inclusion of the material in question will often be decisive in evaluating whether such content should be considered to be harmful to children and adolescents, as in the case of the aforementioned news programmes. In the case of a fiction programme, it will be necessary to consider whether it is necessary to display potentially harmful material to illustrate the story, and the goal of the story: pedagogical, denunciation, awareness-raising. In addition, the degree of potential harm of certain themes will vary according to the respective context: sexuality in the context of a romantic relationship is better assimilated by minors, as is violence that is rejected or punished throughout the programme.

When trying to gauge whether a specific programme content is likely to undermine the free development of children and adolescents, it is necessary to take into account the potential for desensitising viewers vis-à-vis the effects of violence, and fostering a lack of empathy, and encouraging a dehumanised view of others, seeing them as mere means to achieve personal ends, erosion of moral responsibility and distortion of the difference between right and wrong, encouraging anti-social attitudes.

The context also includes other criteria, such as:

- the nature of the programme service that broadcasts the content. A thematic programme service that is specifically designed for children and young people may never broadcast certain types of content that are permitted on other programme services, even if only during the late evening and night. In fact, these programme services create an expectation in parents and educators that none of their content will be harmful to minors. Parents and educators, on the other hand, will have to be careful when they allow minors to watch news programmes, since there will certainly be issues that need parental guidance in order to be properly understood by younger viewers;
- the time that the programme is broadcast. The probability of a programme being seen, albeit inadvertently by minors, increases at certain times: in the morning, before school, in the late afternoon, after school, and at weekends and holidays, especially in the mornings and evenings;
- the programmes that are scheduled before and after the programme (s) concerned. Starting a film that has been rated for persons aged over 16 or an informational programme on a complex topic immediately after a programme that is generally seen by children is definitely not recommended. This is particularly important when the content in question is integrated within commercials, self-promotions and trailers, because the latter may be more harmful than the programme that they advertise. In fact, self-promotions and trailers have a short duration and condense the content of the programme that

they promote, exhibiting content that may lack the editorial justification that exists in the advertised programme;

- the likely expectations of the audience in relation to the specific kind of programme or type of programme service. As stated above, children's programmes create a sense of "trust" for parents and educators. But there are also other programmes, such as news services, especially those broadcast at meal times, soap operas, talk shows, in which the public has some degree of confidence that they will not exhibit content that is likely to undermine the free development of children and adolescents, even if they require parental advice.
- the approximate age of the children that are likely to be watching the programme, always taking into account different aspects such as school operating hours, weekends, holidays and public holidays;
- the degree of anticipation with which the nature of the content is disclosed to the public (by means of a verbal or written warning, acoustic signal or visual symbol) to enable the viewer to make an informed choice; and
- the potential effect on viewers who may inadvertently watch the content.

## **2. Topics**

### **2.1 Drugs, smoking and alcohol**

The consumption, manufacture and trafficking of illegal drugs, drug abuse and alcohol abuse, the consumption of licit substances to cause psychoactive effects without prescription or medical control, and smoking:

- should not be presented in programmes primarily aimed at children and adolescents (i.e. in programmes whose target audience is mainly children and adolescents, such as cartoons and children's series), unless there is a strong editorial justification, combined with an educational and preventive goal;
- should not be fostered or glamorised in other programmes that are likely to be seen by many children and adolescents (i.e. programmes broadcast between 6 am and 10.30 pm) unless there is strong editorial justification.

### **2.2 Violence and Dangerous and Imitable Behaviour**

The display, representation or description of violence and its consequences, whether verbal or physical, must be justified through the context and the use of violence must

be rejected or punished throughout the programme or, in the case of series or programmes with various editions, in one of their editions.

In particular, any content:

- that portrays violence as a normal solution to problems;
- whose heroes attack and cause suffering to their enemies, beyond that which is strictly necessary;
- that convey indifference to the victims;
- that encourage aggressive attitudes;
- whose characters demonstrate pleasure in causing pain and humiliation; and
- that glorify violence

are likely to have a negative influence on the free development of the personalities of children and adolescents, unless there is a strong editorial justification and the use of violence is rejected or punished, as explained above.

### **2.3 Imitable behaviour**

Imitable behaviour is behaviour that has major potential to be imitated by children, thereby jeopardizing their physical or mental integrity, or that of the people around them, in particular their friends and peers from the same age groups.

Such behaviour includes detailed depiction of criminal practices, violent techniques, use of readily available cold weapons or explosives, and bullying, as well as self-destructive conduct (e.g. suicide, self-mutilation, etc.).

Therefore, behaviour that may be easily imitated by children in a way that may jeopardise their physical or mental integrity:

- should not be displayed in programmes whose target audience is primarily children, unless there is a strong editorial justification, combined with an educational and preventive goal;
- should not be included in programmes broadcast between 6 a.m. and 10:30 p.m., unless there is strong editorial justification.

### **2.4 Offensive language**

Offensive language means language that is used as a way to offend and attack the fundamental rights of other people. The concept also includes frequent and decontextualized use of slang.

Programmes containing offensive language, such as verbal aggression, should not be broadcast between 6:00 am and 10:30 pm, unless the language is justified by the context.

Programmes whose predominant tone is based on offensive language should not be broadcast between 6 a.m. and 10:30 p.m.

Programmes that include occasional scenes with extremely rude and degrading language that do not fall within the concept of pornography should not be broadcast between 6 a.m. and 10:30 p.m.

Programmes intended for children up to the age of 10 should not include offensive language under any circumstances.

## **2.5 Nudity**

### **Nudity**

Content in which **exposure of the most intimate parts of the human body (in men, the pubic area and buttocks, in women, the breasts, pubic area and buttocks) exhibits a sexual or erotic connotation**, with explicit or detailed display, in particular content in which such exposure is frequent or presented with resources that enhance the impact of such exposure (i.e., using technical or artistic means to highlight such exposure or provoke excitement in the viewer), should not be broadcast between 6 a.m. and 10:30 p.m.

Exposure of intimate parts of the human body with a sexual connotation, inserted in the context of a loving relationship, whose presence is not frequent or detailed, may occur between 6 a.m. and 10:30 pm if there is an editorial justification.

Exposure of intimate parts of the human body without a sexual connotation, whose presence is not frequent or detailed, may occur between 6 a.m. and 10:30 p.m.

Exposure of intimate parts of the human body without a sexual connotation, with frequent or detailed presence, may occur between 6 a.m. and 10:30 p.m. if there is a strong editorial justification (informational or educational purposes) and it is clear to viewers that it is one of the main themes of the programme (for example, a documentary about the human body, about surgeries, or about diseases that affect the respective parts of the body).

## **2.6 Representation of sexual acts**

Content with a sexual connotation, which are difficult for minors to fully understand, which require a degree of mental maturity, or where simulation of sexual acts is

explicit and detailed, or frequent, or that uses features which enhance the respective impact, should not be broadcast between 6 a.m. and 10 p.m.

## **2.7 Fear and distress**

This category includes content involving serious emotional conflict or psychological violence, tragic and irreversible traumatic experiences, victims with serious injuries or violent death, human corpses, fantasy or extra-terrestrial creatures with attitudes or behaviour that instil terror, spiritism, possession, exorcism, occult practices and paranormal and haunting characters, such as witches, wizards, ghosts, monsters, werewolves, vampires, living dead, mutants, introduced for the purpose of causing fear or anguish, that are usually typical features of the "horror" genre.

In order to evaluate content of this nature, it will be necessary to consider factors such as the respective duration, frequency and detail, the impact of music and sound effects, and whether such frightening content is quickly counterbalanced by reassuring content.

Hence, content linked to the universe of terror (as referred to above) involving minors as protagonists, or that is presented in a detailed and realistic manner or with serious negative consequences (e.g. homicides, amputation of body parts, excessive punishment, or other content involving intense physical or psychological violence), or content that generates in minors strong feelings of fear and distress, should not be broadcast between 6 a.m. and 10:30 p.m..

## **2.8 Eating disorders**

Programmes that explicitly display or encourage lifestyles that are severely harmful to personal health, worship of extreme thinness, and eating disorders such as anorexia or bulimia, or programmes in which the presence of such elements is frequent, realistic, or detailed without a pedagogical or preventive purpose, should not be broadcast between 6 a.m. and 10:30 p.m.

## **2.9 Gambling**

Programmes that incite irresponsible gambling practices (i.e. that incite gambling in an addictive manner or that poses the risk of serious financial loss for the gambler) or misleading special promotions should not be broadcast between 6 a.m. and 10:30 p.m. and should be preceded by a warning informing minors that they cannot take part in such programmes.

## **2.10 Reality shows**

In relation to the television genre of reality shows (entertainment programmes which, in general, aim to portray the lives of anonymous persons, instead of "using actors and a scripted plot"), in order to decide whether the broadcast content falls within the framework of no. 4 of article 27 of the Television Law, programme services must take the following criteria into account:

- profusion of obscene language/ insults;
- humiliation of the protagonists;
- trivialisation of sexuality;
- a superficial image of human relations that is given or broadcast;
- depiction of risky, uncivilised or illegal behaviour.

The programme must therefore ensure that the content that they broadcast between 6 a.m. and 10:30 p.m.:

- does not exploit the inexperience and credulity of children and adolescents;
- does not incite unprejudiced, offensive, aggressive, discriminatory, dangerous or unlawful behaviour to be carried out or presented without a penalty, or glorify such behaviour;
- does not present scenes whose protagonists, in particular children, adolescents or young people, are submitted to situations that may be detrimental to their physical, mental or moral integrity, and when such situations occur unexpectedly, a proportional sanction that discourages the portrayed practices.

## **2.11 Comedy programmes**

Comedy programmes that require adult maturity to be properly understood, in order to avoid the creation or reinforcement of stereotypes about more vulnerable groups in society or the creation of conceptions about sexuality, violence, or antisocial and transgressive behaviour that may be detrimental to the development of children and adolescents, as well as comedy programmes that frequently use offensive and obscene language, should not be broadcast between 6 a.m. and 10:30 p.m..

### **Systematic framework for the understanding of the Regulatory Authority for the Media (ERC on the application of nos. 3 and 4 of Article 27 of the Television Law aimed at the protection of children and adolescents**

#### **I. Context**

Nos. 3 and 4 of Article 27 of the Television and On-Demand Audiovisual Services Law (hereinafter “Television Law”) impose restrictions on television broadcast content that might negatively influence the development of the personality of children and adolescents, although both nos. use vague legal concepts which require interpretation.

Consequently, Article 27 (9) of the Television Law<sup>5</sup> states that, “The Entidade Reguladora para a Comunicação Social (Regulatory Authority for the Media) shall define and make public the criteria for assessing non-compliance with nos. 3 and 4, which criteria shall be objective, fitting, necessary and proportional to the objectives pursued.”

Nonetheless, the Court of Competition, Regulation and Supervision (TCRS) has already clarified<sup>6</sup> this matter, stating that, “no legal norm exists in a vacuum. In effect, nos. 3 and 4 of Article 27 of the Television Law impose specific behaviour on broadcasters. In Article 27 (9) of the same law, it is stipulated that the Regulatory Authority for the Media (ERC) must publish and define the criteria used to analyse non-compliance with nos. 3 and 4 of Article 27. Article 27 (9) of the Television Law is a central piece of legislation for the ERC, but it does not impose compliance in order to ensure that nos. 3 and 4 of Article 27 are effective. Neither does the TCRS have to agree with the criteria set out by the ERC to comply with Article 27 (9) of the Television Law.” So, “In our opinion, nos. 3 and 4 of Article 27 have their own separate provisions. The law does not require any regulation for these numbers before coming into force. Therefore, regardless of whether or not the ERC considers there is compliance with Article 27 (9) of the Television Law, broadcasters are immediately obliged to comply with the provisions specified in nos. 3 and 4 of Article 27.” In fact, “they do not relate to other legislation, as mentioned above. What exist in nos. 3 and 4 of Article 27 of the Television Law is the use of vague concepts. Given that they specify that the qualified behaviour constitute mere social offences, they do not require the same degree of precision and determination, in terms of concepts, as criminal legislation, although, as the TCRS mentions in the aforementioned judgment, ‘it is essential that their application in no way hinders the objective determination of prohibited behaviour and other punishable elements’. In our opinion, nos. 3 and 4 of Article 27 of the Television Law comply with these minimum requirements for objective determination of prohibited behaviour.”

Despite the court’s stance, the ERC considers that in compliance with Article 27 (9) of the Television Law it should systematically publish the criteria it has applied to assess compliance with the provisions specified in nos. 3 and 4 of Article 27 of said Law.

In this context and as an update and simplification of the guidelines already adopted by the ERC under the terms of Decision 19/CONT-TV/2011 of 5 July, this document has been prepared, which lays out the legislative framework governing the protection of minors with regard to television content to which they are exposed, and succinctly sets out the ERC’s approach by analysing some of its most emblematic decisions.

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<sup>5</sup> Approved by Law No. 27/2007 of 30th July and amended by Law No. 8/2011 of 11th April, Law No. 40/2014 of 9th July and Law No. 78/2015 of 29<sup>th</sup> July.

<sup>6</sup> Judgment issued on 6th January 2014, under proceedings 3503/12.OTBOER.

## II. General legal regime

The protection of younger audiences contributes to the “prevention of irreversible harm in shaping the personality of minors, ensuring appropriate social integration and capacity for self-determination, at the psychological, intellectual, moral, emotional and relational level, given that, because they are easier to influence and impressionable, they are particularly vulnerable”.<sup>7</sup>

Chapter 8 of the Audiovisual Media Services Directive (AVMSD) of 2010, more precisely Article 27, deals with the issue of the protection of minors in television broadcasting. This issue was already addressed in EU instruments preceding the AVMSD, both with regard to the programming (see Article 22 of the Television without Frontiers Directive (TFD), 1989) and advertising (see Article 16 of the TFD) of television operators, but the AVMSD, in Article 12, extended the protection hitherto only afforded to television services to on-demand audiovisual services as well.

The AVMSD was transposed into Portuguese law by the Television and Audiovisual Media Services Law (Television Law) – Law No. 27/2007 of 30 July amended by Law No. 8/2011 of 11 April and Law No. 40/2014 of 9 July. This law enshrines programming, but establishes limits, and hence limits this very freedom, with respect to the principle of human dignity and respect for fundamental rights, freedoms and guarantees (Article 26, 27 and 34 (1) of the Television Law).

Freedom of programming, as referred to in Articles 26 and 27 of the Television Law, is one of the key principles of television broadcasting stemming from the freedom of expression enshrined in Article 37 (1) of the Portuguese constitution (CRP). However, it may be limited by other rights also protected by the constitution which, on a case-by-case analysis, are deemed to override it.

“Freedom of programming, within television broadcasting, constitutes the specific faculty of the freedom of expression. Broadcasters’ independence to determine television content and how to present it is a rule which can only be limited when faced with other constitutionally protected values or rights, even if legally implemented, the binding weighting criteria to which the legislator under the restriction of fundamental rights are observed ... and the law at stake is questioned.”<sup>8</sup>

In that sense, Article 27 of the Television Law establishes the limits to freedom of programming, weighing it against other fundamental rights, in particular those enshrined in Article 26 of the CRP, which recognises the right to personal identity, development of personality, civil capacity, citizenship, good name and reputation,

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<sup>7</sup> Canotilho J.J., Machado Jónatas, E.M., *Reality Shows e Liberdade de Programação*, Coimbra Editora, 2003, p. 59.

<sup>8</sup> Carvalho A.A., Cardoso A. M., Figueiredo J. P., *Legislação Anotada da Comunicação Social*, Casa das Letras, 2005, p.134.

image, word, privacy of one's private and family life, and legal protection against any form of discrimination.

Free development of the personality is protected by nos. 3 and 4 of article 27 of the Television Law. No. 3 prohibits broadcast programmes which are likely to cause an obvious and serious adverse effect on the free development of the personality of children and adolescents, including programmes which contain pornography, in the case of the programme services provided via non-conditional access, or gratuitous violence. No. 4 determines that the television broadcast of any other programme which is likely to have an adverse effect on the development of the personality of children or adolescents is only to be broadcast while permanently displaying an appropriate visual symbol and only between 10:30 p.m. and 6.00 a.m.

It should be noted that the legislator's concerns here are not limited to linear television broadcasts. No. 10 of the same Article enshrines certain obligations on on-demand (non-linear) audiovisual services, specifically the need to adopt suitable technical functions to avoid children and adolescents accessing content liable to manifestly, seriously and gravely harm the free formation of their personality. This content is consequently equivalent to that referred to in Article 27.3 of the Television Law.

Also of note is the applicability of the limits in nos. 1-3 and 7 of Article 27 to television programme services outside Portuguese jurisdiction, whose broadcasting may be grounds to suspend re-broadcasting (Article 28 and Article 86 of the Television Law). For its part, the offer of programmes included in on-demand audiovisual service catalogues which breach the provisions laid out in nos. 1 and 7 of Article 27, whether under Portuguese jurisdiction (Article 86-B.1) or from other EU Member States (Article 86-B.2 et seq.), may be prevented.

It is worth noting that, unlike its predecessors – Law No. 58/90, Law No. 31-A/98 and Law No. 32/2003 – the current Television Law has replaced the expression “most vulnerable groups” with “children and adolescents”.

However, the scope of the ERC's regulatory duties are not restricted only to children and adolescents. Article 7(c) of Law No. 53/2005 of 8th November (EstERC) entrusts it with safeguarding “the protection of the most sensitive groups, such as minors”, which means that its responsibility as the sector's regulator extends beyond children and young people.

### **III. Limits on freedom of programming – Record of ERD decisions**

Television and on-demand audiovisual service broadcasting, as mentioned above, is based on freedom of programming. The powers of the ERC, namely in applying the limits to television freedom of programming, are intended to defend fundamental rights and other constitutionally important values and are enshrined in Articles 26 and 27 of the Television Law.

It is the established position of the sector's regulatory authority that "a broadcaster's freedom of programming can only be taken away in situations that are clearly undeniable" – **DEL 4-D/2006**.

Equally, following an identical guideline, **DEL 16/CONT-TV/2011** notes that "freedom of programming is not, however, unfettered, and must coexist with other values which are constitutionally recognised".

It is therefore also the established understanding of the ERC that "in the case of children and adolescents, limits on freedom of programming aim ... to safeguard the fundamental right to develop one's personality, which has to be especially protected during childhood and adolescence, since these stages in personal development decisively influence the personality for the rest of the individual's life". – **DEL 27/CONT-TV/2012**.

Whenever there is conflict between freedom of programming and the right to develop one's personality, therefore, both the CRP and the Television Law require the separate interests to be weighed in line with the principle of practical agreement (Article 18.2 of the CRP), which is executed via a criterion of proportionality in the distribution of the costs of the legal dispute. In other words, the choice between the various ways of resolving the issue should depend on which least undermines the values at stake according to their weighting therein.

It is also important to refer to the concept of **broadcasting ethics**, in Article 34 of the Television Law, which states in no. 1 that "all broadcasters, in their programming, must ensure, through self-regulation, compliance with broadcasting ethics that assure respect for human dignity, fundamental rights and other constitutional values, especially the development of the personality of children and adolescents".

Broadcasting ethics are therefore an "implicit" commitment between the broadcaster and the viewer whose content is not directly shaped by the law but by the broadcaster, in line with the expectations it creates in its "target audience" over time according to the programming it usually offers and the conduct it adopts with regard to it on a daily basis. The age classification of the content falls into this category.

In that sense, in **DEL 27/CONT-TV/2012** it is considered that "broadcasters must not limit themselves to the minimum compliance with Article 27 of the Television Law. The importance and impact of programming on viewers, who in most cases spend a portion of every day watching television, require and justify broadcasters to bear in mind this constant relationship they establish with them, ensuring they are guided by the principle of good faith and trust".

The broadcaster has the ethical duty to uphold permanent vigilance and careful weighing of the suitability of content at a particular time, ensuring that which could negatively influence the personality of children and adolescents is shown during protected time slots.

➤ **Article 27 of the Television Law**

In the ERC's records, various decisions can be found that relate to Article 27 of the Television Law, reflecting the guidelines issued by the regulatory authority, both as regards the absolute and relative limits enshrined in the Article, of which, without excluding the others, the following stand out:

**A. ABSOLUTE LIMITS**

- i. Article 27 (3) of the Television Law, which is applicable to television broadcasts and on-demand audiovisual services, establishes an absolute prohibition on the broadcast of programmes which are likely to cause an obvious and serious adverse effect on the free development of the personality children and adolescents.

Of programmes which may manifestly, seriously and gravely harm the free formation of the personality of children and adolescents, the legislator, while not limiting itself to these alone, identified an unequivocal prohibition on programmes which contain **pornography**, on non-conditional access programme services, and **gratuitous portrayal of violence** (see Article 27 (3)).

• **GRATUITOUS PORTRAYAL OF VIOLENCE**

The concept of **gratuitous portrayal of violence** is different from the concept of simple violence. The regulatory authority is influenced by the definition in the R(97)19 Recommendation of the Committee of Ministers of the Council of Europe of 30 October ("Portrayal of violence in the electronic media") which states that gratuitous portrayal of violence is "the dissemination of messages, words and images, the violent content and presentation of which is given a prominence which is not justified in the context".

The ERC includes the concepts of **torture** (defined in Article 243.3 of the Penal Code) and **inhumane, cruel or degrading treatment** in the category of gratuitous portrayal of violence.

Relevant decisions in this matter:

- **DEL 1/LLC-TV/2007** – In reference to the images of Saddam Hussein's execution shown by TVI on its news services: "These images were not only unnecessary in informational terms but also disrespected human dignity and are a clear example of gratuitous portrayal of violence as referred to in Article 24.1 of the Television Law."

- **DEL 16/CONT-TV/2011** – Complaints for broadcasting images of a murder: "... from a journalistic point of view, the images of the murder were not necessary as they neither

added to the news nor adhered to any journalistic, ethical or deontological criteria; in verifying, in sum, that the images of the murder had no intrinsic news value, being used to exploit a dramatic, violent and shocking event for the sole purpose of impressing viewers and holding their attention, without properly weighing up the respective implications in terms of violating human dignity and victim privacy; whereas the video is likely to affect the formation of the personality of the youngest audiences manifestly, seriously and gravely since it contains gratuitous portrayal of violence, revealed not only by the inhumane nature of the event, which is shocking and disturbing, but also by the fact that its screening was not necessary to understand the event.”

- **PORNOGRAPHY**

With regard to pornographic content, the regulatory authority is influenced by the concept contained in Administrative Order 245/83 of 3 March on the classification of performance shows. Chapter 2 of this document relates to pornographic performance shows. Article 6 states that, in general terms, performance shows shall be deemed pornographic if they exhibit situations and sexual acts with the primary aim of exciting viewers and if they exhibit poor aesthetic quality.

It is also important here to draw a distinction between the concept of **pornography** (hardcore and softcore) and the broadcasting of nudity or existence of sexual references, visible or verbal.

It is also the regulatory authority’s established view that broadcasters who provide programmes with pornographic content must ensure that their access is restricted via a specific counter measure. In that sense, **DEL 16/CONT-TV/2009** concludes that “programme services whose programming model is based on pornographic content may not be shown via non-conditional access, whether the service is paid for or not”.

Also important here is **DEL 37/CONT-TV/2009** where it states that “pornography has been defined as corresponding to content in which sexual acts and the intimate parts of the body, such as the genitals, are overtly or clearly visible”, and also mentions that “sexually explicit content does not automatically equate to pornographic content”.

It should be noted that Article 27.10 of the Television Law states that “Programmes of on-demand audiovisual media services which are likely to cause obvious and serious harm to the free development of the personality of children and adolescents, such as programmes with pornographic content, may only be made available provided that sufficient technical features are adopted so as to prevent access to such content by that audience segment.”

## **B. RELATIVE LIMITS – RESTRICTED VIEWING**

Article 27 (4) of the Television Law establishes a relative ban that imposes restricted viewing, both in terms of time slot and appropriate visual identification, stipulating that “any other programmes that may negatively shape the personality of children and adolescents must be accompanied by an appropriate visual identification symbol at all times and may only be shown from 10.30 pm to 6.00 am.”

The legislator does not establish criteria for appealing against this relative ban, leaving it up to the interpreting body to do so.

In interpreting and applying this concept, the regulatory authority deems that “by defining a set of limits on freedom of programming, the aim of the legislator was certainly not to create a sanitised and infantilised world where children and adolescents have no contact with disturbing images” – **DEL 14-Q/2006**.

“It is not the ERC’s responsibility to survey the quality or good taste of the programmes shown on any television programme service but rather to assess compliance or otherwise with the limits on freedom of programming, so the role of educators in monitoring and guiding exposure by children and adolescents to different television content must not be neglected” - **DEL 8/CONT/TV/2011**.

“The ERC believes that regulatory intervention on television should also not be confused with policing “good taste” or even the “politically correct in public discourse.” – **DEL 19/CONT/2011**.

“It is also noted that no distinction is made between programme genres or types of potentially harmful content. In weighing (il)legal situations that may fall under Article 27 (4), these could include programmes as diverse as soap operas, films, documentaries, news reports, shows or games, as well as commercial/advertising or self-promotional content” - **DEL 19/CONT/2011**.

“The actions of the regulatory authority are governed by the objective to guarantee respect for the limits of the contented broadcast and not by individual values or perspectives related to morality or more pronounced feelings of decency” – **DEL 21/CON-TV/2011**.

“For certain content to fall under Article 27 (4) it must have a harmful effect on the shaping of the personality of minors, either due to the immediate nature of the images (e.g. violent or non-pornographic sexual images) or the message conveyed” - **DEL 56/2013/CONTPROG-TV**.

“In terms of contextualising messages in the media, parents and educators have the important and inalienable duty to watch over and decode the messages to which children and adolescents are exposed, not merely in interpersonal relations, but also in those in which the media acts as intermediary” – **DEL 101/2013CONTPROG/TV**.

“... television and other media, such as the Internet, influence perceptions of reality and the attitudes of children and adolescents, so it is increasingly urgent that parents and educators monitor and contextualize all cases that might raise doubts, deciding

which content is most appropriate for the stage of development and maturity of minors within their care” – **DEL 101/2013/CONTPROG/TV.**

“Article 27 (4) of the Television Law does not mention content that is liable to have an ‘objective’ or ‘manifest’ effect on shaping the personality of children and adolescents; in other words, it states that all content prejudicial to minors, whether manifestly so or otherwise, may not be broadcast from 6.00 am to 10.30 pm. Therefore, if there is any doubt as to whether content is liable to affect the development of the personality of more sensitive audiences, according to the law, it should be reserved for the time slot from 10.30 pm to 6.00 am.” - **DEL 3/2015 CONT/TV/PC.**

#### **- SEXUALITY**

As far as sexuality/nudity is concerned, “the ERC does not seek the sanitisation of the public sphere with regard to matters such as sex, nor does it ignore that current media content is frequently eroticised in a great variety of contexts and forms. However, bearing in mind the aims of regulation to protect more sensitive groups, amongst which minors, against content and services that are liable to harm their development, the regulatory authority should analyse their content from the perspective of a putative negative influence on the shaping of the personality of younger viewers” - **DEL 6/CONT-TV/2011.**

It is a fact that as “exposure to content of a sexual nature is a part of daily life, it is unreasonable to expect that in today’s media children and adolescents would not come into contact with some aspect of sexuality or nudity in different communication contexts” - **DEL 19/CONT/2011.**

Therefore, “in entertainment programmes, the exhibition of nudity and scenes of sexual content does not automatically fall under Article 27 (4), provided it does not occur gratuitously, overtly, explicitly and disproportionately, but is instead incorporated into the story and without being given excessive prominence” - **DEL 19/CONT/2011.** Similarly, **DEL 3/2015 (CONTPRG-TV-PC)** expresses the understanding that “it is not just the broadcasting of full nudity that makes content of an erotic and sexual nature potentially harmful to young children; it is also other factors, such as the context, narrative, language, broadcasting of sexual practices and more adult forms of sexuality, etc., such as the images in question in this procedure, which, although they do not contain full frontal nudity, are difficult for children and adolescents to deconstruct.”

It should also be mentioned that the regulatory authority has deemed the broadcasting of certain sexual and erotic content in the non-protected time slot as reprehensible when children and adolescents would find it hard to decode and critically interpret certain television messages related to more adult and explicit forms of sexuality, or easily disconnect from this content.

As stated in **DEL 18/CONT-TV/2008**, the existence of “visual and textual discursive elements that are not adjusted to the experience and degree of maturity expected in

younger audiences with regard to ‘harder’ sexual expressions,” as well as “elements of a shocking and coarse nature – which a child would find difficult to decode, as well as the accompanying language” – **DEL 6/CONT-TV/2008** – are to be condemned and therefore come under Article 27 (4) of the Television Law.

#### **- VIOLENT AND SHOCKING CONTENT**

The regulatory authority considers that the mere broadcasting of violent content, both of a physical and psychological nature, cannot be deemed sufficient condition to conclude that Article 27 (4) of the Television Law has been infringed. Therefore, **DEL 14-Q/2006** states that “younger audiences come into direct or mediated contact with different types and degrees of violence”.

“During the process of growing up and socialising, children and adolescents are exposed to different types of behaviour, some of which are more aggressive and violent; it is therefore incumbent on parents and educators in general to fulfil the important role of contextualising or decoding messages, helping them to create and develop their identity and personality. This function of monitoring and supervision extends to the messages and content broadcast via television” – **DEL /17/CON TV/2011**.

“For better or worse, violence is a part of everyone’s daily life, whether a child, young person or adult. It was never the legislator’s intention to create, through Article 24 (2), a sugar-coated, sanitised and infantilised world in which children and adolescents have no contact with any form of violence” – **DEL 1/CONT TV/2012**.

“In certain justified cases, the broadcasting of certain content of a violent or shocking nature in the non-protected time slot and without warning is acceptable, bearing in mind the special framework underlying this or the fact that, ultimately, it discourages certain risky behaviour” - **DEL 19/CONT-TV/2011**.

However, in **DEL 28/CONT-TV/2012**, the regulatory authority deemed the broadcasting of threats, insults and the atmosphere surrounding physical aggression in prime time breached the limits of freedom of programming set out in Article 27 (4) of the Television Law.

#### **- INAPPROPRIATE LANGUAGE**

Language considered to be “inappropriate” or “obscene” does not, in itself, provide grounds for the application of Article 27 (4) of the Television Law. The language used must be placed in context, bearing in mind, in particular, its nature, the particular nature of the programme and the time slot. Therefore, **DEL 19/CONT/2011** notes that, “when analysing the terms and expressions used, they must always be placed in the context of a specific programme.”

“... broadcasters must recognise the existence of audiences with different susceptibilities, so programmes with potentially more aggressive language, while not obligatorily subject to the restrictions in Article 27 (4) of the LTV [Television Law], are preferably shown in a later time slot” – **DEL 29/CONT-TV/2011**.

#### **- HUMOROUS CONTENT**

“Humorous programmes are associated with a certain level of transgression and must be adjudged from the perspective of exercising freedom of expression and artistic creation. In general, humour requires the ability to decode and deconstruct, of which not all audiences are capable, bearing in mind their sensitivity to the content and their degree of maturity, which may not allow understanding of more symbolic meanings. Nevertheless, freedom of expression must not be prioritised over offending human dignity, which is all the more overt the more vulnerable the target audience” - **DEL 19/CONT-TV/2011**.

“It is established in the case-law of the Regulatory Board that appraisal of humorous programmes must be fundamentally moulded by the exercise of freedom of expression and artistic creativity, in recognition that a defining aspect of humour is its ‘subversive quality and potential for transgression’, which constitute extreme traits in the sub-genre of black humour” – **DEL 23/CONT-TV/ 2011**.

“It is difficult to draw a dividing line between what is acceptable and what is not when we are talking about something as genetically transgressive as humour, in which freedom of expression is pushed to the limits. However, as set out in **DEL 13/CONT-TV/2011**, “the exercise of freedom of expression, even for humorous purposes, cannot be used as a rule under which offences are perpetrated aimed at mocking, belittling, demeaning or humiliating a certain group of citizens or individuals” – **DEL 23/CONT-TV/2011**.

- **SPECIFIC CASES**

#### **- CHILDREN’S SERIES**

Children’s series have particular characteristics – and raise special concerns – with regard to their putative negative influence on children and young people via the potential for mimicry and the possible legitimising and trivialisation of negatively deemed behaviour.

In **DEL 3/CONT-TV/2009**, relating to the children’s series “Morangos com Açúcar”, the regulatory authority deemed that, notwithstanding the fact that it had not infringed Article 27 of the Television Law, the broadcaster should be made aware of the need to safeguard some aspects identified in the analysis which required attention and vigilance, in terms of the “careful and responsible treatment of more sensitive and divisive material”.

Conversely, in **DEL 28/CONT-TV/2009** relating to the children's series "Rebelde Way", the regulatory authority concluded that the limits on freedom of programming had been surpassed. Viewers pointed to the use of language and representations of sexuality in the series that were inappropriate given the target audience. It was felt that, for a programme aimed at an audience of children and young people, "at an age when adolescents are becoming aware of their sexuality, the adoption of an educational approach to the sexual behaviour depicted or suggested in the series would be desirable, namely moderating the permanently sexualised language adopted by the series' characters". It also criticised the trivialisation of alcohol consumption by adolescents, permanently on the verge of drunkenness, without any mention of the intrinsic risks of this kind of behaviour.

#### **- REALITY SHOWS**

- "... although the idea underlying the reality show is real life, it should be seen as a controlled staging by the programme producers that follows a script and results in a dramatisation of events. This constructed character is suggested, for example, in the frequent difference in contestants' behaviour on set and in their natural habitat. This element of staging is not always grasped and decoded by audiences of different ages, who, on the contrary, tend to see this behaviour as being genuine" – **DEL 28/CONT-TV/2012**.

"... this type of reality show which explores the daily lives of ordinary people in an enclosed and highly controlled space, encouraging viewer voyeurism, has become more trivialised over more than a decade in order to gain greater acceptance in the media and society for broadcasting and exploiting privacy and intimacy" – **DEL 28/CONT-TV/2012**.

In the case in question, the regulatory authority decided (**Decisions 15/CONT-TV/2011, 6/CONT-TV/2012, 66/2014 (CONTPROG-TV) and 67/2014 (CONTPROG-TV)**) that the broadcaster had to exercise greater control over the content of reality shows to prevent elements that might harm sensitive audiences, specifically children and young people.

#### **- CINEMATIC WORKS**

Broadcasters normally follow the rankings of the Classification Committee of Shows (CCE) of the General Inspectorate of Cultural Activities (IGAC) for cinematic works, as in fact set out in Article 27 (5) of the Television Law, and the self-regulatory model of Television Programme Classification. However, in many situations, the ERC gives films an appropriate classification for their broadcasting on television, bearing in mind the time slot and the need to add advertising.

The regulatory authority is of the opinion that the CCE's ranking of a cinematic work should not be regarded as an imposition, in the sense of preventing a programme service from applying more restrictive criteria. In complying with broadcasting ethics,

namely respect for the protection of children and minors, broadcasters may have to adopt more demanding standards when classifying cinematic works since minors have more and easier access to television programming than to films shown in cinemas.

Therefore, the ERC considers that “CCE rankings are only ‘a minimum’ (and not a maximum) restriction, and may be complemented by television-based restrictions” - **DEL 19 CONT-TV/2011.**

#### **- CHILDREN’S THEMATIC PROGRAMME SERVICES**

Children’s thematic programme services are programme services aimed at minors and on which, therefore, viewers expect to see content intended for that age group. If that is the case, there is far less risk of broadcasting content that may be harmful to the development of children and adolescents.

“Children’s thematic programme services have a special obligation to ensure their content is suitable for the age of their viewers since their classification gives parents and educators the sensation that less control of content is needed, and as such they must be especially careful when planning programming” - **DEL 27/2014 (CONTPROG-TV).**

#### **- BULLFIGHTING**

The ERC considers it acceptable to show bullfighting at unrestricted time slots, bearing in mind that it is a Portuguese cultural manifestation, and for the legislator to impose the requirement to classify it as suitable for children over the age of 6 - **DEL 13/CONT-TV/2008.**

#### **- GAMBLING**

The regulatory authority considers that gambling does not fall “automatically” within the scope of restrictions on freedom of programming, but deems that “it is not sustainable to defend its unrestricted broadcasting, free of any constraints. It calls upon broadcasters to show ethical responsibility by only broadcasting gambling activities at suitable times and to certify that this content does not contain calls for irresponsible gambling or misleading promotions” – **DEL 31/CON TV/2010.**

#### **- WRESTLING**

As far as televised wrestling is concerned, the ERC takes into account the theatricality and stage-managed nature of the event (there is no blood or injuries), but positively notes the warning issued by some broadcasters that viewers should not try to emulate the actions observed.

## **- MEDICAL OPERATIONS**

“The Regulatory Board of the ERC regards the broadcasting of a live surgical operation, with all the harshness that surgery involves, meant that it should have been shown at a time when it was less likely to be watched by more vulnerable audiences, as already mentioned, between 10.30 pm and 6.00 am” - **DEL 38/CONT-TV/2011.**

## **C. EXEMPTION FOR NEWS SERVICES**

Article 27 (8) of the Television Law recognises a special status for news services, since it allows content which may negatively influence the shaping of the personality of young people and adolescents to be shown regardless of the time, provided it:

- Is important from a journalistic perspective;
- Is presented in due respect for the ethical standards of the profession;
- Is preceded by a warning concerning the nature of the material.

The situation referred to in no. 8 reveals, for the purposes of the right to information, and so long as the assumptions of the legislation are observed, that content “liable to negatively influence the shaping of the personality of children and adolescents” may be shown outside the hours set out in Article 27 (4) provided a prior warning is issued as to the nature of the news to be shown. This warning allows the viewer to choose whether they wish to watch the material referred to or not.

However, “the freedom to inform cannot supplant the fundamental rights of those referred to in the news. These rights may only be restricted in situations of conflict where the public interest is predominant, thereby imposing this restriction” - **DEL 7/CONT-I/2008.**